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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 976

In the Matter of the Determination and Declaration of Heirs of HO CHANG SHEE, also known as Chang Shee, Deceased.

KAM HON HO, KAM CHIN CHUN MING, KAM YEE TING, KAM HEE HO, KAM MAN HO, KAM KONG HO, and YOUNG TIM HO, *Petitioners,*

vs.

KAM MOON KAM, KAM YIN ENG, KAM MEE CHAR, KWAN HEEN HO, KAM HOU WONG, KAM LO HO, KAM YIP CHOCK, KAM SUNG DOTT, HOON CHEONG MOCK, and KOON CHUNG BERTELMANN, *Respondents.*

No. 20,338
(Sup. Ct. Hawaii No. 4356)

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

The above named petitioners pray that a writ of certiorari be issued to review the judgment of the

United States Court of Appeals for the Ninth Circuit filed on October 15, 1965, granting the Motion to Dismiss filed by the respondents upon the ground that the United States Court of Appeals for the Ninth Circuit has no jurisdiction of the above entitled cause. The United States Court of Appeals for the Ninth Circuit did not file a written opinion.

OPINION BELOW

The opinion of the Supreme Court of the State of Hawaii was entered on the 1st day of December, 1964. The decision of the Supreme Court of Hawaii on the Petition for Rehearing was filed on June 2, 1965. The judgment of the United States Court of Appeals for the Ninth Circuit was filed on October 15, 1965.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. Secs. 1293 and 1254(1).

QUESTIONS PRESENTED

1. Whether or not the United States Court of Appeals for the Ninth Circuit has jurisdiction in the above entitled cause from an appeal of the Supreme

Court of the State of Hawaii (formerly known as the Supreme Court of the Territory of Hawaii) when the above entitled cause was pending in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii before and at the time the Hawaii Admission Act of 1959 granting statehood to the Territory of Hawaii.

2. Whether Section 13 of the Admission Act for the State of Hawaii deprived the petitioners of the right of appeal to the United States Court of Appeals for the Ninth Circuit, and if so whether the provisions of the Admission Act depriving petitioners of such right of appeal are unconstitutional and in violation of the Fifth Amendment of the United States Constitution.

STATUTES INVOLVED

1. Section 1293, 28 U.S.C.

2. Fifth Amendment of the Constitution of the United States of America.

3. Sections 13, 14 and 22 of the Admission Act for the State of Hawaii, Public Law 86-3, 73 Stat. 4.

4. Section 5 of the Organic Act which provided a government for the Territory of Hawaii under the laws and the Constitution of the United States of America.

5. Section 2 of Article XVI and Section 4 of the Constitution of the State of Hawaii.

STATEMENT OF PLEADINGS AND FACTS

1. On June 18, 1952, petitioners filed their Petition to Determine the Heirs of Ho Chang Shee, a decedent, in the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

2. On January 9, 1959, the trial court finally allowed the trial of the action.

3. On March 17, 1959, the trial court heard the final argument and took the matter under advisement.

4. On July 10, 1962, at respondents' request, the case was reopened to admit a single item of documentary evidence.

5. On July 31, 1962, the trial court rendered its decision.

6. On December 7, 1962, petitioners filed their Notice of Appeal to the Supreme Court of the State of Hawaii.

7. On December 1, 1964, the Supreme Court of the State of Hawaii rendered its decision, a copy of which is attached in the appendix, infra.

8. On January 7, 1965, petitioners filed a Petition for Rehearing.

9. On June 2, 1965, the Supreme Court of the State of Hawaii denied the Petition for Rehearing.

10. On July 2, 1965, this appeal was noted.

11. On September 16, 1965, the respondents filed their Motion to Dismiss upon the ground that Sec. 14 of the Admission Act for the State of Hawaii, Public

Law 86-3, 73 Stat. 4, amended Sec. 1293, 28 U.S.C., terminating the Court of Appeals jurisdiction over future Hawaii appeals.

12. On October 15, 1965, the United States Court of Appeals for the Ninth Circuit filed its judgment dismissing the appeal, a copy of which is attached in the appendix, infra.

SPECIFICATION OF ERROR TO BE URGED

The United States Court of Appeals erred in granting the Motion to Dismiss in that it refused to hold that to the extent it deprived petitioners of the right of appeal to the United States Court of Appeals for the Ninth Circuit of a case which was pending in the Courts of the Territory of Hawaii for nine years, the last part of Sec. 13 of the Admission Act is unconstitutional in depriving petitioners of due process of law and the equal protection of law contrary to the Fifth Amendment of the United States Constitution.

REASONS FOR GRANTING THE WRIT AND SUMMARY OF ARGUMENTS

The United States Court of Appeals for the Ninth Circuit has jurisdiction to hear petitioners' appeal before Hawaii became a state and has jurisdiction to hear this case at the present time.

Before Hawaii was admitted into the Union as a State, there was no question of the jurisdiction of

said Circuit Court to hear an appeal such as that before United States Court of Appeals for the Ninth Circuit from the Supreme Court of Hawaii. Section 1293, 28 U.S.C.

Public Law 86-3, 73 Stat. 4, an Act to provide for the Admission of the State of Hawaii into the Union, was not intended to deprive said Circuit Court of its jurisdiction to hear an appeal from the Supreme Court of Hawaii on a case which was pending in the courts of Hawaii on the date of admission of Hawaii as a State into the Union. See United States Code, Congressional and Administrative News, Vol. 2, page 1325, 86th Congress, 1st Session, 1959, at page 1364.

> "Section 13 insures that the rights of appeal will not be disturbed by admission of the State into the Union."
>
> "Section 14 makes a number of changes in the Judicial Code. The effect of the changes, all of which serve to place the State of Hawaii in equal status with other States, is as follows: . . . ."

The fact preserving all rights of appeal so that they would not be disturbed insures to petitioners and to said Circuit Court to hear it on appeal and the right of the petitioners to appeal to this Court.

This right to appeal and the jurisdiction of said Circuit Court to hear such appeal constitutes part of petitioners' day in court. All other tribunals may close their eyes and ears to petitioners' evidence, but until said Circuit Court has done so, petitioners' day in court is not done. Consequently, this right of appeal is not simply procedural but substantive. It is a right

under Section 1293, 28 U.S.C. It is a vested right. *Damon v. Tsutsui,* 31 Haw. 678, 692 (1930); *Graham, et al. v. Sulser, et al.,* 27 Cal. 163, 377 P. 275, 279 (1962).

The fact that respondents were able to effect delay of the trial of the case for almost seven years—the fact that the trial court refused to render its decision for more than three years after trial was completed and it took the case under advisement—the fact that the Supreme Court of the State of Hawaii took more than two years before rendering its final decision—should not be allowed to combine with respondents' construction of Section 13 of the Admission Act to deprive petitioners of their day in court.

Section 1293, 28 U.S.C., provides:

> "Final decisions of Puerto Rico and Hawaii Supreme Courts
>
> "The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii, respectively in all cases involving Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs. June 25, 1948, c. 646, 62 Stat. 929."

Section 13 of the Admission Act for the State of Hawaii provides:

> "Parties shall have the same rights of appeal from and appellate review of final decisions of the United States District Court for the District

of Hawaii or the Supreme Court of the Territory of Hawaii in any case finally decided prior to admission of said State into the Union, whether or not an appeal therefrom shall have been perfected prior to such admission, and the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the United States shall have the same jurisdiction therein, as by law provided prior to admission of said State into the Union, and any mandate issued subsequent to the admission of said State shall be to the United States District Court for the District of Hawaii or a court of the State, as may be appropriate. Parties shall have the same rights of appeal from and appellate review of all orders, judgments, and decrees of the United States District Court for the District of Hawaii and of the Supreme Court of the Territory of Hawaii, in any case pending at the time of admission of said State into the Union, and the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the United States shall have the same jurisdiction therein, as by law provided in any case arising subsequent to the admission of said State into the Union."

The law as it existed when an action is brought determines the rights of the parties litigant as to the right of appeal. Petitioners' right of appeal to said Circuit Court and the jurisdiction of said Circuit Court to hear this appeal was fixed by law on June 18, 1952, when the action was filed. The fact that Hawaii became a State and the fact that Hawaii's courts, whether Territorial or State moved slowly and

the fact that upon becoming a State new procedures for appeal were provided for the courts of Hawaii do not affect the vested rights of appeal of petitioners which vested on June 18, 1952. And this vested right of appeal to the United States Court of Appeals for the Ninth Circuit can be exercised as long as this Court of Appeals exists.

To the extent Section 13 of the Admission Act takes away petitioners' vested right of appeal to said Circuit Court, it deprives petitioners of due process of law.

To the extent Section 13 of the Admission Act discriminates between litigants in providing different avenues of appeal or foreclosing appeals depending upon whether the prospective petitioners have been able to move the lower courts to decide sooner or later in time, it deprives petitioners of the equal protection of the laws, making such protection dependent upon the whims of decision by the lower tribunals. In *Lee Hong v. Acheson,* 110 F. Supp. 60 (Hawaii, 1951), and *Lee Bung Hong v. Acheson,* 110 F. Supp. 48 (Hawaii, 1951), petitioners failed to reach the United States before a specific birthday as required by Sections 301(b) and 301(c) of the Immigration and Nationality Act of 1952. The court held that such failure does not work a forfeiture or loss of American citizenship because of prevention by paramount force. So here, petitioners were prevented by paramount force and circumstance beyond their control from meeting the deadline for final decision by the Hawaii

Supreme Court to enable them to proceed under the first sentence of Section 13 to appeal to this Court. They should not be deprived of this right of appeal. They should not be deprived of their day in court.

In line with the expressed intent of Congress to preserve all rights of appeal so that they would not be disturbed by admission of the State into the Union, note also the language of Article XVI of the Constitution of the State of Hawaii, which provides:

"TRANSITIONAL PROVISIONS
CONTINUITY OF LAWS"

"Section 2. All laws in force at the time this constitution takes effect and not inconsistent therewith, including, among others, acts of Congress relating to lands in the possession, use and control of the Territory of Hawaii, shall be the laws of the State remain in force, mutatis mutandis, until they expire by their own limitation, or are altered or repealed by the legislature."

"Except as otherwise provided by this constitution, all existing writs, actions, suits, proceedings, civil or criminal liabilities, prosecutions, judgments, sentences, orders, decrees, appeals, causes of actions, contracts, claims, demands, titles and rights shall continue unaffected notwithstanding the taking effect of this constitution, except that the State shall be the legal successor to the Territory in respect thereof, and may be maintained, enforced or prosecuted, as the case may be, before the appropriate or corresponding tribunals or agencies of or under the State or of the United States, in the name of the State, political subdi-

> vision, person or other party entitled to do so, in all respects as fully as could have been done prior to taking effect of this constitution."

The question of jurisdiction raised by respondents by their Motion to Dismiss is apparently one of first impression before said Circuit Court and this Court.

Both the Constitution of the State of Hawaii and the Admission Act for the State of Hawaii sought to provide transitional measures to insure that all rights of appeal will not be disturbed by admission of Hawaii into the Union. If this objective has not been met by the statutory draftsmen, the deficiency must be met by this Court by statutory construction, and in aid of this, Section 22 of the Admission Act provides:

> "If any provision of this Act, or any section, subsection, sentence, clause, phrase, or individual word, or the application thereof in any circumstances is held invalid, the validity of the remainder of the Act and of the application of any such provision, section, subsection, sentence, clause, phrase, or individual word in other circumstances shall not be affected thereby."

We submit that the last portion of Section 13 of the Admission Act reading, "as by law provided in any case arising subsequent to the admission of said State into the Union," is unconstitutional, is surplusage, and should be declared invalid, and that this appeal is properly taken.

CONCLUSION

Petitioners respectfully submit that the decision of the United States Court of Appeals for the Ninth Circuit filed on October 15, 1965, dismissing the appeal is a manifest error and should be reversed to have the appeal heard on its merits.

Dated, Honolulu, Hawaii, this 14th day of December, 1965.

LEON L. M. CHUN,
W. Y. CHAR,
By W. Y. CHAR,
Attorneys for Petitioners.

(Appendix Follows)

Appendix

United States Court of Appeals
for the Ninth Circuit

Kam Hon Ho, et al., Appellants, vs. Kam Moon Kam, et al., Appellees.	No. 20,338 (Sup. Ct. Hawaii No. 4356)

JUDGMENT

Appeal from the Supreme Court of Hawaii.

This Cause came on to be heard on the Transcript of the Record from the Supreme Court of Hawaii and upon motion of counsel for the appellees to dismiss the appeal, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the motion of appellees to dismiss the appeal be and hereby is granted and that the appeal in this Cause be, and hereby is dismissed.

Filed Nov. 23, 1965
At 2:30 o'clock P.M.
Gus K. Sproat
Clerk Supreme Court

A True Copy
Attest: November 22, 1965
Frank H. Schmid, Clerk

Filed and entered October 15, 1965

In the Supreme Court of the State of Hawaii,
October Term 1964.

In the Matter of the Determination and
Declaration of Heirs of Ho Chang Shee,
also known as Chang Shee, Deceased.

No. 4356

Appeal from Circuit Court First Circuit,
Hon. Frank A. McKinley, Judge.

December 1, 1964.

Tsukiyama, C. J., Cassidy, Wirtz, Lewis, JJ.,
and Circuit Judge King, in place of Mizuha, J.,
Disqualified.

Appeal and Error—findings of trial court—when set aside.

Under H.R.C.P., Rule 52(a) this court will not set aside findings of fact unless "clearly erroneous."

Parent and Child—existence of relationship—burden of proof—presumption.

The relationship of parent and child is a fact to be proved by the person asserting the same but is presumed to exist where it is shown that the parties lived together and recognized by their acts the existence of the relationship.

Same—same—effect of presumption.

Where a presumption of the existence of the relationship of parent and child is applicable and the legitimacy of the child is not involved, the presumption may be rebutted by any inconsistent facts, but where the legitimacy of the child is in question, the presumption is controlling if it is not met by "irrefragable" proof to the contrary.

OPINION OF THE COURT BY CIRCUIT JUDGE KING.

This is another facet of a family dispute part of which has been before this court on another appeal. A very clear and complete statement of the situation is set forth in *Chun Ming v. Ho,* 45 Haw. 521, 371 P.2d 379 (1962). In the decision of that case, mention was made of a petition for determination of the heirs of Chang Shee, Equity No. 5664 in the First Circuit Court. This court also ordered that "matters which concern the Chang Shee estate are to be held in abeyance until determination of her heirs."

Equity No. 5664 commenced on June 18, 1952, as a petition for determination of the heirs of Chang Shee who died intestate on August 11, 1927. The petitioners are Kam Chin Chun Ming, Kam Hon Ho, Kam Yee Ting, Kam Man Ho, Kam Kong Ho, and Young Tim Ho, who alleged that they and Kam Hee Ho are the only surviving heirs at law of their mother, Chang Shee. These persons are referred to as "the seven."

On October 2, 1952, Kam Moon Kam, Kam Yin Eng, Kam Me Char, Kwan Heen Ho, Kam Hou Wong,

Kam Lo Ho, Kam Yip Chock, Kam Sung Dott, Hoon Cheong Mock, and Kam Chung Bertleman filed an answer admitting that "the seven" are children of Chang Shee but alleging that they also are surviving children and heirs at law of said Chang Shee. These respondents are referred to as "the ten."

"The seven" admit to the same status another child, Kam Yau Ho, who died on April 21, 1930, single and without children. "The ten" include as children of Chang Shee, Kam Yau Ho and two more children, Wah Leong Ho, who died on June 6, 1936, single and without children, and Wah Teong Ho, who died on May 21, 1933, single and without children. Chang Shee's widowed husband, Ho Poi, died on May 29, 1941.

Hearings were held beginning January 9, 1959, and ending April 20, 1959, on which date the judge took the matter under advisement and announced that no decision would be rendered until this court had acted on the then pending appeal in *Chun Ming v. Ho, supra.* That case was decided on May 2, 1962. Thereafter, the judge heard further argument, received further evidence, again took the case under advisement, and on July 31, 1962, filed his decision, followed by a decree on August 10, 1962, finding that the heirs at law of Chang Shee at the time of her death were the 20 children mentioned above. There was a motion for a new trial which was denied on December 5, 1962, after which "the seven" filed this appeal.

One would have supposed that it would be a relatively simple matter to prove whether or not the same

woman gave birth to 20 children between 1892 and 1917. The difficulty is that until the death of Ho Poi, the admitted father of all 20 children, there had been no issue raised that any of these children were not also the natural children of Chang Shee, Ho Poi's only lawful wife. Contrariwise, there had been positive sworn statements by Ho Poi, Chang Shee, and three of "the seven" that all 20 children were the children of Ho Poi and Chang Shee. After Ho Poi's death and in the petition for probate of his will filed by Kam Hee Ho, one of "the seven," only "the seven" were named as his heirs at law and next of kin. On August 11, 1941, two of "the ten" entered their appearance in the probate proceedings and set forth the claim of "the ten" to be also children and heirs at law of Ho Poi. This gave rise to the dispute.

"The seven" admit that Ho Poi is the father of "the ten" but deny that Chang Shee is their mother and claim that another woman, Chun Shee, is their mother. This is buttressed by birth certificates, a record book kept by Ho Poi, and the testimony of individuals who said Ho Poi had children by the two women.

Chun Shee was a woman who accompanied Ho Poi and his wife to Hawaii in 1891 when she was about 10 years of age and who remained in the same household until her death on January 23, 1919. Her status is ambiguous when viewed in the light of Western concepts for it is suggested by "the seven" that she was Ho Poi's "second wife" and the mother of 12 of his children ("the ten" plus 2 deceased children).

The law and its presumptions have been fully developed where the identity of the mother is known but the identity of the father is controverted. See *Hopkins v. Chung Wa,* 4 Haw. 650; *Godfrey v. Rowland,* 16 Haw. 377; *Godfrey v. Rowland,* 17 Haw. 577; *McMillan v. Peters,* 30 Haw. 574. The reverse situation seems to have presented itself to the courts very infrequently.

In Re Bennett's Estate, 135 Misc. 486, 238 N.Y.S. 723, was a probate case involving the right of an alleged daughter of the decedent to administration as against the alleged widow. The principal point of the case was the validity of a divorce decree obtained by the decedent from the petitioning widow, but the relationship of the daughter was also questioned. The judge of the surrogate's court said on this latter issue:

> "The further attack made in the instant petition on the relationship of Mrs. Anderson to the decedent is not worthy of serious consideration. All of the evidence adduced demonstrates that *the recognized relationship of parent and child existed between them, and under such circumstances the burden is upon the person denying the relationship to show by 'irrefragable proof' that it did not exist.* * * *" (At page 737, italics added.)

In view of the judge's decision that the decree of divorce was void and that therefore petitioner as the lawful widow was entitled to administration, the remarks concerning the legitimacy of the alleged daughter were unnecessary. However, it is interesting to

note that the alleged daughter of decedent was not the daughter of the widow and that no mention is made in the decision of any other marriage of the decedent.

Livernash v. De Lorme, 208 Mich. 295, 175 N.W. 177, was an action of ejectment against the alleged daughter of a decedent by a claimant to the real property involved who would be entitled thereto if the defendant were not such daughter. The probate court had already determined the heirs of the decedent to be his eight brothers and sisters and not the alleged daughter. The issue of parentage in the ejectment action was submitted to a jury which found for the daughter. In affirming the judgment below the court said:

> "It stands practically undisputed that Ethel lived from early infancy in the Darrow home with Harvey W. Darrow and wife in the relation of parents and child, treated and recognized by them in word and act as their daughter. In 29 Cyc. 1583, the relation of parent and child in general is thus stated:
>
> " 'The term "parent and child" is used to indicate the relation existing between husband and wife, or either of them, on the one hand, and their legitimate offspring on the other. The existence of the relation is a question of fact, and is established prima facie where it is shown that the parties lived together, and recognized by their acts the existence of that relation.' " (At pages 180-181.)

In Re Matthews' Estate, 153 N.Y. 443, 47 N.E. 901, was an appeal from the decree of final settlement of

the accounts of an executor which necessarily included a finding that the decedent's mother had had another legitimate daughter named Harriet. The children of a deceased brother of the decedent denied that Harriet was the legitimate child of decedent's mother. In affirming the judgment, the Court of Appeals said:

> *"While the question of legitimacy has most frequently arisen while marriage was claimed or proved, and the nonaccess of the husband or the validity of the marriage was at issue, still it is manifest that the presumption of legitimacy is not limited to cases involving those questions. It has a wider application, and applies to every case where the question is at issue.* It is based upon broad principles of natural justice and the supposed virtue of the mother. It is a branch of that general rule of equity and justice which assumes the innocence of a person until there is proof of actual guilt; and, *whenever it is not inconsistent with the facts proved, this presumption is controlling.* If a former marriage is necessary to sustain the presumption, it will be assumed until contrary proof is given. When, as in this case, there is evidence on the one side of mere reputation, which is casual, remote, and uncertain, and the presumption of legitimacy on the other, it becomes a question of fact, and the decision of the trial court must be treated as final and conclusive upon the parties. It is true that the precise question under consideration was not involved in some of the cases cited; yet the opinions of the learned judges and text writers, who have so fully recognized and plainly stated the presumption and grounds upon which it rests, are entitled to great weight, and should be re-

garded as controlling. The existence of such a presumption is in consonance with every correct sense of propriety and justice. Any other rule would be fraught with danger, and produce immeasurable uncertainty. Property rights would be rendered doubtful, and the fair frame of their ancestors might be destroyed, by the cupidity of remote heirs and next of kin. There might be others who would be willing to dishonor their ancestors and bastardize their relatives to increase their patrimony. In the absence of this presumption, the protection of property and character would require proof of the marriage and legitimacy of ancestors, however remote, and in cases where it could not be obtained. To hold that this safeguard of the law does not exist would serve no good or proper purpose, and would overrule a beneficent principle of the law as it is now understood. *We have no hesitation in adhering to the principle that the law presumes legitimacy, and not illegitimacy; morality, and not immorality; social integrity, and not social dishonor; and in declaring such to be the law of this state.* * * *" (At page 903, italics added.)

In Re Fink's Estate, 343 Pa. 65, 21 A.2d 883, was an appeal from a decree settling the first and final account of a trustee and distributing estate. The decedent had been raised by a man and his wife as their own daughter. Later her parenthood was questioned. It appears that the lady who raised her may have had a child at about the time decedent was born but that this other child died soon after birth and somehow decedent was substituted. The appellate court held that no one of several claimants could establish a

relationship with the decedent and therefore her property escheated to the District of Columbia for the benefit of the poor. In discussing the effect of presumptions, the court said:

> "To say that the relationship is established 'prima facie' may mean either that enough has been shown to make a finding of the existence of the relationship permissible or it may mean that such finding is obligatory in the absence of other evidence. * * * It would seem that if the fact finding body believed the evidence of the proponents, the latter is the proper meaning here. *If it were shown that a child had been reared and recognized as the child of a married couple, that should be enough to raise a presumption that he was in fact their child, even though no evidence were presented to prove his birth to them.* * * *
>
> *"It is not open to question that the burden of proving their kinship by a preponderance of evidence was upon the * * * claimants * * **. They sought to maintain this burden by showing the facts dealing with the relationship and relying largely upon what they treated as presumptions. However, the presumption itself is not evidence. * * * When the presumption relied upon had been rebutted by sufficient evidence, the presumption passed from the picture, though the facts or actual evidence from which the presumption arose remained, free from any artificial effect, to be considered along with the other evidence. * * * It cannot be doubted that when all the evidence was presented in this case the presumption had been sufficiently rebutted and that it became necessary to weigh the evidence on both sides for the purpose of ascertaining where the preponderance lay.

"In our opinion the lower court erred in setting up too exacting a standard for the evidence necessary to rebut the presumption raised by the evidence bearing on the status of Helen as part of the Fink family. We are unable to find any authority in our cases for the position that the quantity of proof required to rebut this presumption is the same as that which exists as to legitimacy. *The adjectives quoted by the court below, such as 'clear', 'direct', 'satisfactory', 'irrefragable', 'beyond a reasonable doubt', 'precise', and 'indubitable', are applicable to situations where the legitimacy of a child is in question.* There are many weighty reasons why a child born in lawful wedlock should be presumed to be legitimate that are not common to the relationship of parent and child. *It has become part of the substantial law of evidence in this state that the proofs necessary to rebut a presumption of legitimacy must be of the highest order.* * * *" (At pages 888-889, italics added.)

From these authorities we deduce that the relationship of parent and child is a fact to be proved by the person asserting the same, that the relationship is presumed to exist in fact where it is shown that the parties lived together and recognized by their acts the existence of the relationship, that this presumption may be rebutted, that where the legitimacy of the child is not involved and the presumption has been rebutted by sufficient evidence the trier of facts must weigh the evidence on both sides without considering the presumption, but that the evidence necessary to rebut the presumption is greater where the legitimacy of the child is in question and in such a case the pre-

sumption is controlling if it is not met by "irrefragable" proof.

There is much in the situation which tends to support the allegations of "the seven." Perhaps Ho Poi did father children by both his lawful wife, Chang Shee, and another woman, Chun Shee. However, if this is admitted, the parentage of all children born after Chun Shee became of child-bearing age becomes doubtful. There is then no overriding reason to assign any of these children to Chang Shee or Chun Shee. If it is held, as "the seven" maintain, that the sworn testimony of three of their number and of their mother and father and also the petitions for several certificates of Hawaiian birth were all part of a deliberate plan for the purpose of avoiding possible criminal action against Ho Poi, would not such a plan of deliberate falsification under oath also cast a cloud on the parentage of each of "the seven"? If Kam Kong Ho (one of "the seven") and Kam Hou Wong (one of "the ten") were actually born within 7 days of each other, as "the seven" contend but "the ten" deny, how does one prove that either child must necessarily have been born of either mother?[1]

These considerations illuminate the desirability of applying a presumption in this case which places the

[1]The admission made in the answer of "the ten" that "the seven" were the children of Chang Shee was coupled with the proposition that they themselves were also the children of Chang Shee. When the answer is construed "to do substantial justice," as provided by H.R.C.P., Rule 8(f), it amounted to an assertion that all seventeen were the children of Chang Shee, "the ten" as well as "the seven." Thus there was no admission as to the parentage of "the seven" that could be used to refute the claim of "the ten" to equal status.

burden upon "the seven" of showing by "irrefragable" proof that the relationship of mother and child did not exist between Chang Shee and each of "the ten." The judge below concluded that no such standard of proof was met. This court cannot now say that his conclusion is "clearly erroneous," even though we have reason to doubt the credibility of some of the testimony on the part of "the ten," as well as some of the testimony on the part of "the seven." H.R.C.P. Rule 52(a); *Peine v. Murphy,* 46 Haw. 233, 377 P.2d 708; *Filipino Fed. of America v. Cubico,* 46 Haw. 353, 380 P.2d 488.

Appellants assert that the trial court erred in not accepting Exhibit 15 (Ho Poi's notebook) as setting forth the true birthdays and maternity of Ho Poi's children. As the court noted, there is nothing in the exhibit identifying the mother of any particular child, and the birthdates set forth therein were not used in the family while those set up by "the ten" were the ones invariably used. Furthermore, although Exhibit 15 is purportedly mostly in Ho Poi's writing, in applying for certificates of Hawaiian birth for his children he himself gave the birthdates contended for by "the ten."

Appellants also assert that the trial court erred in refusing to admit Exhibit 14 for identification into evidence. This is a memorial tablet which identifies Chun Shee as a "deceased mother." It does not identify her children and was prepared by the wife of one of "the seven" after the death of Ho Poi on May 29, 1941. It is noted that litigation over the issue

of parentage commenced with the petition for probate of Ho Poi's will filed on June 27, 1941. These considerations reduce the probative value of the exhibit. However, the error, if any, in excluding the exhibit was not prejudicial since we reach the same result even if it be assumed that Ho Poi did father children by both Chang Shee and Chun Shee.

Appellants further assert that the trial court erred in holding that Cooke Trust Company, Limited, administrator with the will annexed of the estate of Ho Poi, deceased, was a proper party to these proceedings. We see no merit in this specification of error. Cooke Trust Company, Limited, took no part in the trial below or in the appeal in this court. Its only interest is in the real property described in the petition, for the protection of which it has remained in the case inasmuch as its predecessor executor had listed the same real property among the assets of Ho Poi. It need hardly be added that this opinion does not attempt to decide in whose estate the real property in question is properly inventoried.

The remaining specifications of error do not present any new points for consideration.

For the reasons given, the decree of the trial court is affirmed.

Leon L. M. Chun and
W. Y. Char for Appellants,
Earl S. Robinson (Fong, Miho,
Choy & Robinson) for
Respondents-Appellees.

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IN THE

Supreme Court of the United States

October Term 1965

No. 976

KAM HON HO, *et al.*,

Petitioners,

vs.

KAM MOON KAM, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Earl Warren, Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

The Respondents stated hereinabove, in response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, respectfully suggest that no sufficient grounds exist for the granting of said petition because:

(1) This case presents no "special and important reasons" of the character specified in Rule 19 of the Revised Rules of this Court as grounds for granting a writ of certiorari.

(2) The Court of Appeals for the Ninth Circuit committed no error in dismissing the appeal of the Petitioners from the final judgment of the Supreme Court of the State of Hawaii in this case for lack of jurisdiction.

STATEMENT OF THE CASE

On June 18, 1952 petitioners filed a Petition to Determine the Heirs of Ho Chang Shee in the Circuit Court of the First Judicial Circuit, Territory of Hawaii. (R. 3) The respondents filed their answer thereto on October 2, 1952. (R. 10) The trial on the merits commenced January 9, 1959 and, with some interruptions, first terminated March 17, 1959, when the court heard final arguments and took the matter under advisement. (R. 71 et seq.) On March 18, 1959 the Admissions Act for the State of Hawaii, 73 Stat. 4, was passed by Congress and on August 21, 1959 the State of Hawaii was formally admitted into the Union. The case was reopened for further evidence on July 10, 1962. After hearing further argument on the evidence the trial judge rendered his decision on July 31, 1962, finding all the petitioners and respondents to be the children of Ho Chang Shee. (R. 55) Petitioners' motion for a new trial was denied. (R. 57, 65) Petitioners appealed that decision to the Supreme Court of the State of Hawaii on December 7, 1962. (R. 67) After the submission of briefs and oral arguments by the parties hereto the Supreme Court rendered its opinion on December 1, 1964 affirming the decree of the trial judge. (R. 93) Petitioners' Petition for Rehearing was denied and a Judgment on Appeal duly filed on June 8, 1965. (R. 113, 118)

Petitioners noted an appeal from that Judgment of the Supreme Court of the State of Hawaii to the United States Court of Appeals for the Ninth Circuit on July 2, 1965. (R. Vol. 3) On September 22, 1965 respondents filed a Motion to Dismiss petitioners' appeal before the Court of Appeals, which was argued before said Court of Appeals on October 11, 1965. (R. Vol. 3) The Order and Judgment of said Court of Appeals granting said Motion to Dismiss and dismissing said appeal was duly entered October 15, 1965. (R. Vol. 3)

The Petition for Writ of Certiorari in this case was filed herein on February 2, 1966, to review said Judgment of the Court of Appeals entered October 15, 1965.

JUDGMENT BELOW AND STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit did not write any opinion in this action but simply entered its Order and Judgment dismissing the appeal. (R. Vol. 3)

Jurisdiction of petitioners' appeal to the Court of Appeals in this action was apparently based on 28 U.S.C. Sec. 1293, judging from their memorandum on points and authorities filed therein on October 9, 1965 to oppose the motion to dismiss. (R. Vol. 3)

The Petition for Writ of Certiorari invokes 28 U.S.C. Sec 1254 for the jurisdiction of this court.

ADDITIONAL STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S.C.A. Const. Art. III, sec. 1 and 2
U.S.C.A. Const. Art IV, sec. 3
28 U.S.C. sec. 1257

ARGUMENT

A. Petitioners do not set forth any of the special and important reasons under Rule 19 of this court why a writ of certiorari should issue in this case.

No contention is made that the decision of the said Court of Appeals is in conflict with the decision of another court of appeals on the same matter. As a matter of fact, that decision is consistent with a recent decision of the Court of Appeals for the First Circuit which found itself without jurisdiction to hear an appeal from the Supreme Court of Puerto Rico filed after the repeal of 28 U.S.C. Sec. 1293. *The Secretary of the Treasury of Puerto Rico v. Esso Standard Oil Co. et al.*, 332 F. 2d 624 (1964).

The decision of the Court of Appeals in this case was clearly dictated by Sections 13 and 14 of the Admissions Act of Hawaii, passed March 18, 1959, 73 Stat. 4; so that that court had no alternative but to dismiss petitioners' appeal for lack of jurisdiction.

Petitioners' contention that the Admissions Act of Hawaii deprived them of due process of law and the equal protection of the law under the Fifth Amendment of the Constitution of the United States because it deprived them of a vested right to appeal the decision of the Supreme Court of the State of Hawaii to the Court of Appeals for the Ninth Circuit is not supported by the petitioners' cited cases and is contrary to the law on this subject.

B. The Court of Appeals for the Ninth Circuit had no jurisdiction to hear petitioners' appeal.

1. Petitioners' appeal to the Court of Appeals in this case, filed July 2, 1965, was predicated upon 28 U.S.C. Sec. 1293. However, Section 1293 had been repealed by the Act of August 30, 1961, 75 Stat. 417.

Moreover, the Admissions Act of Hawaii of March 18, 1959, 73 Stat. 4, amended Section 1293 by deleting therefrom all references to the Ninth Circuit and Hawaii, thus limiting Section 1293 to appeals from Puerto Rico to the Court of Appeals for the First Circuit.

2. Section 13 of the Hawaii Admissions Act, however, preserved the right of appeal from the Supreme Court of the State of Hawaii to the Court of Appeals for the Ninth Circuit in all pending cases in which a final decision of the Supreme Court of Hawaii had been rendered prior to the admission of the State of Hawaii into the Union on August 21, 1959. In all other cases pending at the time of admission of the State of Hawaii into the Union, the appeal procedure was the same as by law provided in any case arising subsequent to the admission of the State of Hawaii into the Union. The final judgment in this case was filed June 8, 1965 after the decision denying the petition for rehearing so that petitioners' right of appeal was governed by 28 U.S.C. Sec. 1257. Why petitioners failed to apply for a writ of certiorari to this court but chose instead to file an appeal to the Court of Appeals for the Ninth Circuit is not known.

Under this statutory framework, the Court of Appeals for the Ninth Circuit clearly had no jurdisdiction to hear petitioners' appeal so that the first question presented by them in their petition should be summarily disposed of. There is no problem of statutory construction. The provisions of said Section 13 of the Hawaii Admissions Act are clear and free from ambiguity in providing for appeals from final decisions in cases pending at the time of the admission of the State of Hawaii into the Union.

C. Petitioners' contention that they have been deprived of a vested or constitutional right of appeal to the Court of Appeals for the Ninth Circuit by the Admissions Act of Hawaii is entirely without merit.

1. Notwithstanding their laments to the contrary petitioners have certainly had their "day in court." The hearing on the merits took three weeks. After a lengthy trial on the evidence and with full opportunity for legal arguments the trial judge rendered his opinion finding all the petitioners and respondents to be the children of Ho Chang Shee. Petitioners appealed this decision to the Supreme Court of the State of Hawaii which affirmed the trial judge's decision after fully considering the briefs and oral arguments. Under this state of the record, it is frivolous for petitioners to contend that they have not had their day in court and are entitled to have their case heard again on the merits by the Court of Appeals for the Ninth Circuit.

2. Petitioners' contention in their second question that they had a vested right to appeal to the Court of Appeals for the Ninth Circuit from the time their case was filed on June 18, 1952 is not supported by any of their citations. Their attempt to equate a "right of appeal" with vested fishing or property rights (*Damon v. Tsutsui,* cited p. 7 of petition), with vested rights in adoption procedures (*Graham et al. v. Sulser et al.*, cited p. 7 of petition) or with the rights of American citizenship (*Lee Hong* cases cited p. 9 of petition) only serves to emphasize the emptiness of their contentions.

3. Moreover, petitioners' contentions are contrary to the constitutional powers of Congress to regulate territories, admit new states and organize the federal judiciary.

Under its constitutional powers to regulate the U. S. territories, admit new states into the Union (Art. IV, sec. 3), and organize the federal judiciary system (Art. III, sec. 1) the Congress of the U. S. had full power to limit the appeal of cases pending at the date of the admission of the State of Hawaii into the Union to the Court of Appeals for the Ninth Circuit only to those in which the final judgment of the Supreme Court of the Territory of Hawaii had been entered prior to the admission date.

Indeed, under its broad regulatory power to regulate territories Congress might have cut-off "rights of appeal" to the Court of Appeals even in pending cases. *U. S. v Hammond,* 99 F.2d 557 (1938). In that case the Court of Appeals stated that there is no vested right even in a pending appeal. Certiorari was denied. 306 U.S. 638 *In Ex parte Pennsylvania,* 109 U.S. 174 (1883) this court stated: (p. 176)

> "If an appeal will not lie, then the parties are conconcluded by what has been done. Congress alone has the power to determine whether the judgment of a court of the United States, of competent jurisdiction, shall be reviewed or not. If it fails to provide for such a review, the judgment stands as the judgment of the court of last resort, and settles finally the rights of the parties which are involved."

See also *Ex parte Hoard,* 105 U. S. 578 (1887) and *Capital Traction Co. v Hof,* 174 U.S. 1 (1899).

These decisions emphasize the paramount power of Congress to organize the federal judiciary system and to limit the "right of appeal" therein. Its power to regulate the affairs of territories of the United States or to admit new states into the Union is as broad under the federal constitution.

In the Admission Act for Hawaii, Congress did preserve the prior "rights of appeal" in pending cases where a final judgment was entered by the Supreme

Court of the Territory of Hawaii prior to th admission date. Under pre-existing 28 U.S.C. Sec. 1293 an appeal to the Court of Appeals for the Ninth Circuit could only be taken from a "final decision."

By treating all other pending cases (in which no final judgment had been entered prior to the admission date) the same for appellate purposes as any subsequently filed case Congress emphasized the equality of Hawaii's citizens under the constitution of the United States with the citizens of other states, which was really the main purpose of he Admissions Act.

Consequently, as citizens of a sovereign state of the United States, the petitioners were privileged under 28 U.S.C. Sec. 1257 to petition this court for a writ of certiorari after the final judgment of the Supreme Court of the State of Hawaii was entered on June 8, 1965 if they believed that they were denied due process in the hearing of this case. Instead, for some inexplicable reason, petitioners chose to file an appeal before the Court of Appeals for the Ninth Circuit under defunct 28 U.S.C. Sec. 1293 and let the time run out for a review before this court.

Petitioners having thus selected the wrong forum for a review of their case can not now complain about any denial of due process.

CONCLUSION

The Court of Appeals for the Ninth Circuit was without any statutory jurisdiction to hear petitioners' appeal of the final judgment of the Supreme Court of the State of Hawaii entered in this case on June 8, 1965 so that its dismissal of such appeal was correct.

The Admissions Act for the State of Hawaii did not deprive petitioners of any vested or constitutional right of appeal to the Court of Appeals for the Ninth Circuit when it only preserved a right of appeal to such court for cases pending at the time of the admission of the State of Hawaii into the Union on August 21, 1959 where a case was finally decided prior to such admission date.

Accordingly, the petition for a writ of certiorari in this case should be denied.

Dated: Honolulu, Hawaii, February 2, 1966.

Respectfully submitted,
HERBERT Y. C. CHOY
Attorney for Respondents

Of Counsel:
FONG, MIHO, CHOY & ROBINSON

APPENDIX

28 U.S.C. Sec. 1293:

> "The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs."

Admissions Act of Hawaii, March 18, 1959, 73 Stat. 4, Sec. 14:

> "Effective upon the admission of the State of Hawaii into the Union—
>
> "(a) • • •
>
> "(b) title 28, United States Code, section 1293, is amended by striking out the words 'First and Ninth Circuits' and by inserting in lieu thereof 'First Circuit', and by striking out the words, 'supreme courts of Puerto Rico and Hawaii, respectively' and inserting in lieu thereof, 'supreme court of Puerto Rico';"

Section 13:

> "Parties shall have the same rights of appeal from and appellate review of final decisions of the United States District Court for the District of Hawaii or the Supreme Court of the Territory of Hawaii in any case finally decided prior to admission of said State into the Union, whether or not an appeal therefrom shall have been perfected prior to such admission, and the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the United States shall have the same jurisdiction therein, as by law provided prior to admission of said State into the Union, and any mandate issued subsequent to the admission of said State shall be to the United States District Court for the District of Hawaii or a court of the State, as may be appropriate. Parties shall have the same rights of appeal from and appellate review of all orders, judgments, and decrees of the United States District Court for the District of Hawaii and of the Supreme Court of the State of Hawaii as successor to the Supreme Court of the Territory of Hawaii, in any case pending at the time of admission of said State into the Union, and the United States Court of Appeals for

the Ninth Circuit and the Supreme Court of the United States shall have the same jurisdiction therein, as by law provided in any case arising subsequent to the admission of said State into the Union."

28 U.S.C. Sec. 1257:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against is validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the Unied States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Constitution of the United States
Article III, Sec. 1:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their Continuance in Office."

Section 2:

"The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authortiy;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party; to Controversies between two or more States;—between a

State and Citizens of another States;–between Citizens of different States;–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

"The Trial of all Crimes, accept in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

Article IV, Sec. 3:

"New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislature of the States concerned as well as of the Congress.

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."